



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 94 of 2010

IN THE MATTER OF: AN APPLICATION BY LATIZ NAZARALI AND ANISHA LATIF NAZARALI FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION, CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF: THE COMMISSIONER OF LANDS

AND

IN THE MATTER OF: THE REGISTRAR OF TITLES

AND

IN THE MATTER OF: THE REGISTRATION OF TITLES ACT (CAP.281) LAWS OF KENYA

BETWEEN

LATIF NAZARALI.....1ST APPLICANT

ANISHA LATIF NAZARALI.....2ND APPLICANT

VERSUS

COMMISSIONER OF LANDS.....1ST RESPONDENT

THE REGISTRAR OF TITLES.....2ND RESPONDENT

RULING

Through an amended Exparte Chamber Summons application filed on 9th May 2011, the two exparte applicants herein Latif Nazarali and Anisha Latif Nazarali (the applicants) sought the following orders;

- (1) THAT this matter be certified urgent and be heard ex-parte in the first instance.**
- (2) THAT the Applicants herein be granted leave to apply for Judicial Review out of time.**
- (3) THAT leave be granted to the applicant herein to apply for;**

(a) AN ORDER OF CERTIORARI to move into the High Court and quash the decision of the Registrar of Titles vide Gazette Notice No.3460 of 1st April 2010 revoking the Applicants' title to L.R.No.209/10345/20.

(b) AN ORDER OF MANDAMUS compelling the 2nd Respondent to issue a Gazette notice revoking Gazette Notice No.3460 of 1st April 2010

(c) AN ORDER OF PROHIBITION preventing the Respondents from physically taking over L.R. No.209/10345/20

(d) AN ORDER THAT there be a stay of the implementation of the decision of the 2nd Respondent.

(4) The costs of this application be provided for.

(5) Any other order or relief as the Honourable Court may deem fit and expedient to grant”.

The application is expressed to be brought under Order 53 Rule I; Order 50 Rule 5 and 6 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act, Section 8 and 9 of the Law Reform Act, Articles 40,47,48,50 of the Constitution of Kenya and all other enabling provisions of the Law.

The application is supported by the verifying affidavit sworn by Latif Nazarali in support of the initial application for leave dated 6th December 2010 to file a Judicial Review application out of time.

It is premised on grounds stated on its face and in the statutory statement dated 3rd December 2010.

In support of the application, the advocates on record for the applicants filed written submissions on 2nd February 2011 which were highlighted in court by Mr. Nderitu, learned counsel for the applicants on 24th July 2012.

In their application, the applicants have named the Commissioner of Lands and the Registrar of Titles as the 1st and 2nd Respondents respectively. The first applicant who is the deponent in the verifying affidavit sworn in support of the application deponed that the 2nd applicant is his wife and that they are the registered proprietors of all that parcel of land known as LR.No.209/10345/20 (***hereinafter referred to as the suit premises***). He stated that they are aggrieved by the 2nd Respondent's decision of unilaterally revoking their title to the suit premises vide Gazette Notice No.3460 of 1st April 2010. The deponent further averred that they got to learn about the gazette notice on 24th November 2010 through tenants occupying the suit premises and by that time the 6 months period allowed by the law to apply for the judicial review remedy of Certiorari had expired.

The applicants now pray that the court exercises its discretion in enlarging the time within which to apply for orders of Certiorari and for leave to commence Judicial Review proceedings for an order of certiorari to quash the decision of the 2nd Respondent in revoking title to the suit premises and for orders of prohibition and mandamus in terms stated on the face of the application.

In the written and oral submissions made in court by Mr. Nderitu for the applicants, the court was urged to find that it had discretion to enlarge the time within which the applicants could apply for judicial review seeking orders of certiorari in the interest of justice since the applicants proprietary rights were at stake and they were not given a hearing before the 2nd Respondent made the impugned decision.

The reason given for the delay in filing the application within the time prescribed by the law is that the applicants were not aware of the gazette notice till November 2010 and by that time the 6 months statutory limitation period had already expired.

Having considered the application, the submissions by counsel and the authorities cited, I find that though the persuasive authorities relied upon by the applicants from Canada and other Commonwealth countries show that in those jurisdictions, the court has discretionary power to enlarge

time for filing of judicial review proceedings even for orders of certiorari beyond time limited by statute provided sufficient and good cause is shown for the delay in filing the application within the stipulated time, the position is different in Kenya.

In Kenya, the time within which an aggrieved party can apply for leave to commence judicial review proceedings for orders of certiorari is prescribed by both substantive and procedural law.

The substantive law is found in Section 9(3) of the Law Reform Act which is reproduced verbatim in Order 53 Rule(2) of the Civil Procedure Rules (CPR.)

Section 9(3) of the Law Reform Act states that:

“In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

It is important to note that this provision of the law is couched in mandatory terms.

A reading of Section 9(3) of the Law Reform Act shows that it provides an absolute prohibition against the seeking of leave for orders of certiorari to challenge an administrative decision six months after the impugned decision was made. In my view, this section does not leave any room for the exercise of the court’s discretion to enlarge time to allow the filing of an application for leave for orders of certiorari after the statutory period limited by law expired.

This court fully appreciates the gravity and the nature of the grievance the applicants have against the Respondents and the fact that their proprietary rights to property are at stake but the law is that they ought to have applied for leave to apply for orders of certiorari to quash the decision of the 2nd Respondent within six months of the date of publication of the Kenya Gazette Notice conveying the impugned decision.

This is a statutory requirement and not a procedural technicality which this court can disregard in the spirit of assisting the applicants to access substantive justice through the court’s judicial review jurisdiction.

At this juncture I wish to borrow the words of Bosire J (as he then was) in **Nyagah -Vs- Republic (1990) eKLR 291** when he expressed himself in the following terms while ruling on a similar application.

“Section 9(3) of the Law Reform Act, above has a total prohibition to the granting of leave after the expiration of a 6 months duration after the order or decree or judgment under attack. The provision is conclusive. Had it been the intention of the legislature to confer on the Court the power to enlarge the time specified for bringing an application for leave it would have said so or made provision under Section 9(1) of the Law Reform Act, for the making of the rules in that regard”

This position has been reiterated by the Court of Appeal in a number of decisions.

In the case of **Ako -Vs- Special District Commissioner Kisumu & Another (1989) eKLR 163** the Court of Appeal referring to the 6 months limited period in Section 9(3) of the Law Reform Act stated:

“The prohibition is statutory and absolute and is not therefore challengeable under procedural

provisions of the Civil Procedure Rules, more specifically order 49

Rule 5 which makes provision for the enlargement of time”.

In the case of Wilson Osolo -Vs- John Ojiambo Ochola & Another (1995) eKLR the Court of Appeal also expressed itself thus;

“It can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of the Law Reform Act. Whilst the time limited for doing something under the civil Procedure Rules can be extended by an application under order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case, the Law Reform Act”. There is no provision for extension of time to apply for such leave in the Limitation of Actions Act (cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here.”

It is clear from the above decided cases that the court has no discretion to extend the time limited by statute namely the Law Reform Act to apply for leave to seek orders of certiorari. An aggrieved party seeking to challenge an administrative decision must apply for leave to seek the orders of certiorari before the expiry of six months from the date of the impugned decision and in the applicants' case from the date of the publication of the 2nd Respondent's decision. In the circumstances, it is not open to this court to consider whether or not an applicant had genuine reasons for failing to comply with the six months limitation period.

In view of the foregoing, Prayer 2 of the applicants' amended chamber summons application fails and it is hereby rejected.

Flowing from the finding that this court has no jurisdiction to enlarge time to allow an applicant seeking leave to apply for orders of certiorari, it automatically follows that the court cannot grant leave to the applicants herein to apply for an order of certiorari to quash the decision of the 2nd Respondent as prayed in Prayer 3(a) because in their own admission, they filed the application for leave outside the 6 months limitation period. This court is bound by the provisions of Section 9(3) of the Law Reform Act and cannot therefore grant the Applicants leave as sought. Prayer 3(a) of the application is for that reason not merited and it is also rejected.

The applicant had also sought leave to apply for orders of mandamus and prohibition in terms of Prayer 3(b) and (c). Though there is no statutory limitation regarding the time within which an aggrieved party can institute judicial review proceeding for orders of prohibition and mandamus, I find that it would be futile to grant the applicants leave to apply for an order of prohibition since judicial review proceedings for orders of prohibition without a prayer for certiorari in my view would have little or no prospects for success. A prayer for an order of prohibition would of necessity be anchored on a prayer for Certiorari.

As far as the prayer for leave to apply for an order of mandamus is concerned, the applicants did not make any attempt to demonstrate that it has an arguable case for the grant of an order of mandamus at the substantive stage of the proceedings if leave is granted as sought.

The law is that the court can only grant leave to allow the commencement of judicial review proceedings if an applicant establishes a prima facie case with a probability of success in the substantive motion. This has not been done by the applicants in this case.

In the circumstances, the amended chamber summons application dated 7th March 2011 fails in its entirety and it is hereby dismissed with no orders as to costs.

DATED, DELIVERED and SIGNED this 24th day of October 2012.

C.W. GITHUA

JUDGE

In the presence of:

Florence – Court Clerk

Mr. Nderitu for Exparte Applicants

.....for 1st Respondent

.....for 2nd Respondent